U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: SEP 19 2013 Office: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition. The petitioner appealed the matter to the Administrative Appeals Office (AAO). The AAO dismissed the petitioner's appeal. Subsequently, the petitioner filed a motion to reconsider. The AAO dismissed the motion to reconsider and affirmed the appellate decision. The matter is now before the AAO on a second motion to reconsider. The motion will be dismissed, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a computer software engineer specializing in information systems security and cybersecurity. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States. The AAO upheld the director's findings on appeal and again on motion.

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration (USCIS) policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion to reconsider contests the correctness of the original decision based on the previous factual record, as opposed to a motion to reopen which seeks a new hearing based on new or previously unavailable evidence. *See Matter of Cerna*, 20 I&N Dec. 399, 403 (BIA 1991). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

A motion to reconsider cannot be used to raise a legal argument that could have been raised earlier in the proceedings. *See Matter of Medrano*, 20 I&N Dec. 216, 220 (BIA 1990, 1991). Rather, the "additional legal arguments" that may be raised in a motion to reconsider should flow from new law or a *de novo* legal determination reached in its decision that could not have been addressed by the party. *Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006). Further, a motion to reconsider is not a process by which a party may submit, in essence, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior decision. *Id.* Instead, the moving party must specify the factual and legal issues raised on appeal that were decided in error or overlooked in the initial decision or must show how a change in law materially affects the prior decision. *Id.* at 60.

In re New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215, 217-18 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

The AAO previously found that the petitioner's work is in an area of intrinsic merit and that the proposed benefits of his work would be national in scope. However, the AAO determined that the petitioner had failed to establish that he fulfilled the third eligibility factor set forth in *NYSDOT*. The AAO stated:

> In this instance, the petitioner has barely documented his past employment, let alone established that his past contributions set him apart from others in the field to an extent that would warrant the . . . benefit of an exemption from the job offer requirement that, by statute, normally applies to the classification he seeks.

In the December 28, 2012 dismissal of the petitioner's motion, the AAO stated that the petitioner had failed to submit letters from employers detailing his work experience and past contributions in the field. The decision also indicated that the record did not include documentary evidence showing that the petitioner's work to develop security software and related products set him apart from others in the information systems security and cybersecurity fields. The documentation and arguments presented on motion failed to demonstrate a past history of achievement with some degree of influence on the field as a whole. *See NYSDOT* at 219, n. 6. In addition, the petitioner failed to submit an updated, fully executed Form ETA-750B, in duplicate, at the time of filing as required by the regulation at 8 C.F.R. § 204.5(k)(4)(ii). The AAO concluded that the petitioner's motion was unsupported by any persuasive legal argument, precedent decisions, or other comparable evidence to establish that the AAO's appellate decision was based on an incorrect application of law or USCIS policy.

In his current motion, the petitioner states:

> The minimum qualifications for work in the field of Information/cybersecurity is a Bachelor's Degree in a related field typically computer science, information systems or electrical/electronic engineering.
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> * * *
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> The petitioner has provided evidence to show he has worked at innovative startups represented by [redacted] the pioneer vendor of IPSec VPN appliances (used to establish encrypted tunnels for secure communications) and [redacted]. (developer of the first identity based Security Appliance) who delivered cutting edge solutions that extended the frontiers of cybersecurity and also provided a copy of a highly complementary performance review at [redacted] which affirmed his performance as being far above average.
>
> The petitioner also holds an advanced degree (Masters) in Electrical Engineering which is higher the minimum requirement for employment in this field.

The petitioner comments on his work experience and states that his Master's degree in Electrical Engineering is higher than the minimum requirement for employment in his field. The petitioner's advanced degree, however, is not the issue in this matter. The director has already determined that the petitioner qualifies for classification as a member of the professions holding an advanced degree.

This issue in this matter is whether the petitioner's past record of achievement is at a level that would justify a waiver of the job offer requirement. Further, academic degrees and experience are elements that can contribute toward a finding of exceptional ability. *See* 8 C.F.R. § 204.5(k)(3)(ii)(A) and (B), respectively. Exceptional ability, in turn, is not self-evident grounds for the national interest waiver. *See* section 203(b)(2)(A) of the Act. The plain language of section 203(b)(2)(A) of the Act indicates that aliens of exceptional ability and advanced degree professionals are subject to the job offer requirement (including alien employment certification). Moreover, it cannot suffice for the petitioner to state that he possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *NYSDOT* at 221. In all cases the petitioner must demonstrate specific prior achievements that establish the alien's ability to benefit the national interest. *Id.* at 219, n.6.

In addition, the petitioner points to his submission of "a highly complementary performance review at which affirmed his performance as being far above average," but there is no documentary evidence indicating that he has impacted the field to a substantially greater degree than other similary qualified software engineers or cybersecurity specialists. Moreover, there is no evidence showing that the petitioner's specific work has had significant impact outside of the companies where he has worked.

The petitioner further states:

> The petitioner has provided evidence to show he is able to serve the national interest better than the national interest of securing cyberspace identified in an executive order issued by the president of the United States of America which specifically identified Identity Management and Encryption as critical technologies for assuring the security of the nation's infrastructure and underlined the crucial role innovation by industry plays in development of solutions to the rapidly evolving threat landscape in the field.

The petitioner comments on an executive order "which specifically identified Identity Management and Encryption as critical technologies for assuring the security of the nation's infrastructure," but general assertions regarding the overall importance of an alien's area of expertise cannot suffice to establish eligibility for a national interest waiver. *NYSDOT* at 220. As noted in the AAO's two prior decisions, USCIS grants national interest waivers on a case-by-case basis, rather than establishing blanket waivers for entire fields of specialization. *Id.* at 217.

The petitioner again asserts that he meets the preponderance of evidence standard and points to *Kazarian v. USCIS*, 580 F.3d 1030 (9th Cir. 2009) *aff'd in part* 596 F.3d 1115 (9th Cir. 2010) in which the court stated that the AAO had unilaterally imposed novel substantive or evidentiary requirements beyond those set forth in the regulations at 8 C.F.R. § 204.5(h)(3)(iv) and 8 C.F.R. § 204.5(h)(3)(vi). The AAO's previous decisions, however, did not unilaterally impose any novel substantive or evidentiary requirements beyond those set forth in the regulations. Rather, the AAO relied on relevant, published, standing precedent by following the guidelines set forth in *NYSDOT*. As indicated in its prior decision, the AAO agrees that the standard of proof is preponderance of the

evidence. The "preponderance of the evidence" standard, however, does not relieve the petitioner from satisfying the eligibility factors set forth in *NYSDOT*. In the present matter, the documentation submitted by the petitioner fails to demonstrate by a preponderance of the evidence that he will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

The petitioner has not established that the AAO's previous decision was based on an incorrect application of law or Service policy, or that the decision was incorrect based on the evidence of record at the time of the decision. Therefore, the motion does not meet the requirements of a motion to reconsider, and the motion must be dismissed.

The regulation at 8 C.F.R. § 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the motion will be dismissed, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion to reconsider is dismissed, the AAO's December 28, 2012 decision is affirmed, and the petition remains denied.